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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 166

FEDERAL COMPRESS & WAREHOUSE COMPANY AND NEW AMSTERDAM CASUALTY COMPANY OF NEW YORK, APPELLANTS,

vs.

E. R. McLEAN, SHERIFF AND TAX COLLECTOR, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

A.

Statutory Provisions Believed to Sustain the Jurisdiction.

Appellants: Federal Compress & Warehouse Company, a Delaware Corporation, herein called "Company", and New Amsterdam Casualty Company of

New York, a New York Corporation, surety on its appeal bond; Appellee: E. R. McLean, Tax Collector.

Appellee exacted payment of appellant of a privilege tax imposed by Mississippi upon a cotton compress and a cotton warehouse operated by appellant at Cleveland. The tax being paid under protest, recovery was sought pursuant to *Matthews* v. *Rodgers*, 284 U. S. 521, 76 L. Ed. 271. The tax being averred to be (*a*) a direct burden upon interstate commerce, contravening Article 1, Section 8, subdivision 3 of the Federal Constitution; (*b*) taxation of a Federal instrumentality in this that the warehouse and compress was a Federal Bonded Warehouse operated under United States Warehouse Act, Chapter 10, Title 7, U. S. C. A., Section 313, 39 Statutes 486, August 11, 1916.

Appellee exacted from appellant as a condition precedent of appellant's right at Cleveland to conduct its business (*a*) of compress, and (*b*) of warehouse, said privilege tax, for the recovery of which this action was brought, whereupon appeal being taken to the highest court in Mississippi, the Supreme Court, the appellant drew in question the validity of said statutes hereinafter quoted, to wit, said privilege statutes, on the ground that they and each of them were repugnant to the Constitution of the United States, and the decision of the Supreme Court of Mississippi, being the highest court of Mississippi where this question might be determined, was in favor of the validity of said statutes and each of them and said court denied the Federal right claimed.

This appeal is under Section 237, Judicial Code, as amended, Title 28, Section 344, U. S. C. A., and decisions sustaining the jurisdiction of this Court on appeal to determine the invalidity of a State statute averred to contravene the Federal Constitution when the highest court of the State sustains the statute and denies the Federal right are *Nashville, etc., R. Co.* v. *Wallace,* U. S. Advance Sheets, Lawyers Co-op. Pub. Edition, 445; *Liggett* v. *Lee,* U. S. Advance Sheets, 553; *Anglo Chilean Nitrate Sales Corporation* v. *State of Alabama,* U. S. Advance Sheets, 451; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 136, 66 L. Ed. 166.

B.

The Statute of the State the Validity of Which is Involved.

(1) Section 57, page 162, Chapter 88, Laws of Mississippi, 1930, as to compresses:

> "COTTON COMPRESSES.—Upon each person operating a cotton compress, as follows:
>
> "Where the number of bales of cotton compressed per annum is 40,000 bales, or less, and more than 30,000 bales, $400.00,"

and (2) Section 63, Chapter 88, Laws of Mississippi, 1930, as to cotton warehouses:

> "COTTON WAREHOUSES.—Upon each person operating a warehouse for the storage of cotton, whether in conjunction with a compress or not, as follows: * * *
>
> "Where the storage capacity of same is 35,000 bales or less, and more than 20,000, $75.00,"

both alleged to contravene the Commerce Clause and the latter, in addition, to be an undue burden upon a Federal Instrumentality, existing as a National warehouse under Chapter 10, Title 7, U. S. C. A., Section 313, 39 Statutes 486, August 11, 1916.

C.

The Date of the Judgment, April 3, 1933.

D.

Statement of Case.

Federal Compress & Warehouse Company, called "Company", operated a cotton compress and Federal Bonded Warehouse at Cleveland, Mississippi, handling cotton alone. The facts are agreed and appearing in brief narrative form need not be here again repeated.

The Supreme Court of Mississippi held (1) no taxation of a Federal instrumentality; (2) that cotton moving through a Federal bonded warehouse and through the compress was not in interstate commerce, substantially because, while "convenient for", it was not "absolutely essential to its transportation to other states or countries * * *. The appellant's warehouse and compress, therefore, are not instrumentalities of interstate commerce."

Thereasto, appellant's contentions are that such storage and movement is interstate commerce because:

(1) Expressly so held by the three judge court, whose decision was reversed in *Matthews* v. *Rodgers*, 284 U. S. 521, 76 L. Ed. 271;

(2) *Interstate Commerce Act,* Section 1, 49 U. S. C. A., page 11, in defining transportation, thereunder includes:

> "All services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration * * * storage, and handling of property transported."

Southern Pac. Co. v. *Calexico,* 288 Fed. 642; *Omaha Elevator Co.* v. *Union Pac. R. Co.,* 249 Fed. 832; *A. G. S. R. Co.* v. *M'Fadden & Bros.,* 232 F. 1003; *United States* v. *Gosho Co.,* 23 F. (2d) 675;

(3) Movement of cotton under agreed state of facts a stream in interstate commerce under *Swift* v. *United States,* 196 U. S. 397, 49 L. Ed. 524; *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. Ed. 735; *Lemke* v. *Farmer's Grain Co.,* 258 U. S. 53, 66 L. Ed. 461; *Dahnke* v. *Bondurant,* 257 U. S. 290, 66 L. Ed. 243. Compare *People* v. *Perry,* 291 Pac. 237;

(4) There is no point for cotton delivery other than appellant's warehouse and quoad receipt and ultimate shipment, it receives its compensation from the carrier whose agent thereasto it is;

(5) The compression charge is paid by the carrier out of the through rate and is compensation to appellant for furnishing space conservation in its equipment requisite to conduct interstate and foreign movement of cotton as at present carried on.

Foster-Fountain Packing Co. v. *Haydel,* 278 U. S. 10, 73 L. Ed. 153;

(6) 75 per cent of the cotton passing through appellant's plant has its origin at points wherefrom it floats into the compress on a local rate and thereupon after compression takes the through rate from the point of origin to the point of final destination.

Carson Petroleum Co. v. *Vial*, 279 U. S. 104, 73 L. Ed. 631; *United States* v. *Erie R. Co.*, 280 U. S. 101, 74 L. Ed. 206; *United States* v. *Gosho Co.*, 23 Fed. (2d) 675. Compare *Hohenberg* v. *L. & N. R. Co.*, 46 Fed. (2d) 952, at 955, where it was said:

> "The cotton without dispute was originally intended for export, with transit privileges at Montgomery, and though it moved under a local bill of lading from Greenville and other points into Montgomery where it was concentrated, compressed and reshipped by rail to the port of export, it was interstate commerce from the beginning and properly subject to the combination of interstate rates from the point of origin to concentration point, and thence to destination." (Citing cases.)

(7) Concentration and compression have been regulated by the Interstate Commerce Commission as being interstate commerce.

I. C. C. Docket No. 14,940; *Thomas Cotton Company* v. *I. C. R. R. Co.*, 63 I. C. C. 89-92; *Commission* v. *C. of Ga. Ry.*, 45 I. C. C. 516, 519; *Montgomery Cotton Exch.* v. *S. A. L. Ry.*, 109 I. C. C. 579, 582, 586.

As said in *Savannah Traffic Bureau* v. *A. & R. R. R. Co.*, 96 I. C. C. 749:

> "The real purposes of compression of cotton in transit at the expense of the carrier are con-

servation of equipment and economy of transportation."

Under so-called carrier's privilege rates compression is not a transportation service for the shipper, and no obligation rests upon the carrier to perform the service or to pay therefor, except as its compression aids interstate commerce. *New Orleans Cotton Exch.* v. *L. & N. R. R.*, 46 I. C. C. 712; *Cotton from Tennessee River Landings*, 120 I. C. C. 51; *McFadden & Bros. Agency* v. *A. & R. R. R.*, 126 I. C. C. 519; *Augusta Cotton Exch.* v. *G. & F. Ry.*, 146 I. C. C. 245. Compare *State* v. *S. A. & A. P. Ry. Co.*, 73 S. W. 575. *Furst* v. *Brewster*, 282 U. S. 498, 75 L. Ed. 481; *Federal Trade Commission* v. *Association*, 273 U. S. 64, 71 L. Ed. 539; *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 136, 66 L. Ed. 170; *Pennsylvania R. Co.* v. *Commission*, 250 U. S. 566, 63 L. Ed. 1143.

Under these authorities, appellant's contention is that concentration for storage and compression in the warehouse and at the compress of this appellant constituted and is interstate commerce, and that the State may not exact as a condition a privilege tax for engaging therein and failing to pay such State exaction make the doing of interstate commerce a crime.

Compare Section 238, Laws of Mississippi, 1932, page 166, continuously in effect for many years last past, which provides:

> "Damages and Penalty for Failure to Procure License.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by this act, or who shall fail to renew, during the month in which it is

due, the license on a business for which he has theretofore procured a privilege license, shall in each or either instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector, whose duty it is to collect the tax on such business, to collect the said tax and penalty, issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: 'Collected as Damages'; and he shall account for all such penalties, less commissions, as he is required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor, and subject to the penalties therefor."

Compare Section 1314, Code of 1930, continuously in effect for many years last past:

"Penalty Where None Fixed Elsewhere by Statute.—Offenses for such a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than five hundred dollars and imprisonment in the county jail not more than six months, or either."

Respectfully,

MARCELLUS GREEN,
GARNER W. GREEN,
FORREST B. JACKSON,
Attorneys for Appellants.

Filed 5/8/33.

TOM O. ELLIS, *Clerk.*

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